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IN THE

Supreme Court of the United States

October Term, 1963

No. 841

PASQUALE FIUMARA,

Petitioner

vs.

TEXACO, INC., HUMBLE OIL & REFINING COMPANY, GULF OIL CORPORATION and SINCLAIR REFINING COMPANY,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

1.

PETITION

Pasquale Fiumara, your Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on December 20, 1962.

Opinion Below

(a) OPINION BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is not as of this date reported in the official or unofficial reports. The opinion of the United States Court of Appeals for the Third Circuit is as follows:

Argued December 13, 1962

Before Kalodner and Forman, Circuit Judges, and Rosenberg, District Judge.

Opinion of the Court

(Filed December 20, 1962)

Per Curiam:

Upon review of the record we are of the opinion that the District Court did not err in granting the motion of the defendants for summary judgment.

The Order and Judgment of the District Court of May 4, 1962 granting the defendants' motion for summary judgment will be affirmed.

The opinion by Van Dusen, J. of the United States District Court for the Eastern District of Pennsylvania filed on January 16, 1962, is reported in the official reports, 204 Federal Supplement page 544, and the Memorandum Opinion filed by Van Dusen, J. in said court on March 26, 1962 is reported in 204 Federal Supplement page 553. Both opinions are printed in Petitioner's Record, pp. 16a and 37a.

(b) STATEMENT ON WHICH THE JURISDICTION OF THE UNITED STATES SUPREME COURT IS BASED

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 hereto appended.

(i) Judgment To Be Reversed

The judgment entered by the United States Circuit Court of Appeals for the Third Circuit entered December 20, 1962 is as follows:

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of May 4, 1962 granting defendants' motion for summary judgment and entering judgment in favor of defendants and against plaintiff, of the said District Court in this case be, and the same is hereby affirmed with costs.

Attest:
Ida O. Creskoff
Clerk

December 20, 1962

(ii) Rehearing or Extension of Time Allowed Within Which To Petition for a Certiorari

None was sought or allowed.

(iii) Statutory Provisions for Jurisdiction by This Court To Review the Judgment in Question by Writ of Certiorari

This is the original Petition filed for the Certiorari to the United States Court of Appeals for the Third Circuit, which jurisdiction was originally vested in said Court under 28 U.S.C. Section 1291 hereto appended.

The jurisdiction in the United States District Court, the Court of first instance, is in pursuance to Sec. 4 of the Clayton Antitrust Act, also hereto appended.

(c) QUESTIONS PRESENTED FOR REVIEW

1. Where, upon a Motion by the Respondents for Summary Judgment, an Amended Complaint (Complaint) is found by the Court to be sufficient in setting forth a good cause of action in a conspiracy to violate the Anti trust Laws, can the Court *after* Respondents filed their Answers denying the issues of fact presented in this Complaint, sustain Respondents' Renewed Motion for Summary Judgment against the plaintiff upon affidavits subsequently filed by the Respondents?

2. Does the fact that the Court, after having sustained the foregoing Complaint by dismissing Respondents' Motion for Summary Judgment, overruled itself in sustaining Respondents' Renewed Motion for Summary Judgment upon the very same statement of facts, create a legal doubt that must be resolved in favor of the Petitioner?

3. Can an oil producer, after reserving to itself the right to sell to the consumer public in competition with its own dealers, avail itself of the Pennsylvania Fair Trade Act of June 5, 1935, P. L. 266, as amended; 73 P.S. Sec. 7-11, in a Federal Antitrust action instituted by such dealers?

4. Can the United States District Court on a Motion for Summary Judgment in an Antitrust Suit eliminate in a Complaint an allegation for damages, both as to loss of business and counsel fees, for the period involved in defending an illegal injunction suit in the State Court until reversed by that State's highest court of appeals, on the ground that the Petitioner herein did not raise the defense of the violation of the Federal Antitrust Laws in the State Court injunction proceedings?

(d) STATUTES AND REGULATIONS WHICH THIS CASE INVOLVES

Sherman Antitrust Act, approved July 2, 1890, Secs. 1, 2, 4, and 7; 26 Stat. L. 209-10; 15 U.S.C.A. Secs. 1, 2 and 5 and its amendments.

Clayton Antitrust Act, approved October 15, 1914, Secs. 1, 3 and 4; 38 Stat. L. 730-1; 15 U.S.C.A. Secs. 12, 14 and 15 and its amendments.

Miller-Tydings Act, approved Aug. 17, 1937; Title VIII, 50 Stat. L. 693; 15 U.S.C.A. Secs. 1 and 2 and its amendments.

McGuire Act, approved July 14, 1952, Secs. 2 and 5; 66 Stat. L. 631-2; 15 U.S.C.A. Sec. 45 and its amendments.

Title 28 U. S. Code of Civil Procedure, Sec. 1254.

Title 28 U. S. Code of Judicial Procedure, Section 1652; 28 U. S. Code of Judicial Procedure, Section 1291.

Federal Rule of Civil Procedure 46.

Federal Rule of Civil Procedure No. 56(b).

The Pennsylvania Fair Trade Act, approved June 5, 1935, P. L. 266, section 1; 73 P.S. Sec. 7, as amended.

Pertinent parts of text are hereto appended in each.

(e) CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS INVOLVED

These proceedings arose upon a Motion for Summary Judgment filed by the Respondents under Federal Rule of Civil Procedure 56(b) hereto appended, challenging the sufficiency of a Complaint involving an Antitrust Suit filed by the Petitioner in the United States District Court for the Eastern District of Pennsylvania. The Complaint, as amended, is printed in toto in Petitioner's record filed herein on pp. 8a et seq.

The Petitioner conducted a gasoline service station in Philadelphia in the Commonwealth of Pennsylvania and had been dealing exclusively in retail sale of gasoline supplied by the Sinclair Refining Company ("Sinclair"), one of the respondents herein. This arrangement began in 1949 and continued until February 9, 1959, when "Sinclair" obtained an injunction, ostensibly under the Pennsylvania Fair Trade Act of 1935, hereto appended.

Petitioner's annual sales during this period had increased from 76,987 gallons of gasoline in 1950 to 421,353 gallons of gasoline in 1958 just prior to the aforementioned injunction proceedings.

These injunction proceedings were the culmination of events that began in the Fall of 1958 and involved all four of the respondents herein, and is the basis for the charge of conspiracy to fix prices against the respondents for the following reasons:

On October 30, 1958, "Sinclair", one of the respondents, notified its dealers, including the Petitioner, in the Philadelphia area, in the Commonwealth of Pennsylvania, to sell its gasoline at "Sinclair's" demanded minimum retail resale prices, effective November 3, 1958 as follows:

Sinclair H-C Gasoline @ 19.9 cents per gallon.
Sinclair Power X Gasoline @ 23.9 cents per gallon.

On January 12, 1959 the respondent, Gulf Oil Corporation ("Gulf") notified its dealers in the same Philadelphia area to sell its gasoline at "Gulf's" demanded minimum retail resale prices, effective at once as follows:

Good Gulf Gasoline @ 19.9 cents per gallon.
Gulf Super No Nox @ 22.9 cents per gallon.
Gulf Crest @ 25.9 cents per gallon.

Within two days of this notice by "Gulf" to its dealers, the respondent, Texaco, Inc. ("Texaco"), on January 14, 1959, notified its dealers, also in the same Philadelphia area, to sell its gasoline at "Texaco's" demanded minimum retail resale prices, effective January 16, 1959, as follows:

Texaco Chief @ 19.9 cents per gallon.
Texaco Sky Chief @ 23.9 cents per gallon.

Likewise, respondent, Humble Oil & Refining Company ("Humble"), formerly known as "Esso", followed suit and notified its dealers on September 15, 1959, located also in the same Philadelphia area, to sell its gasoline at "Humble's" demanded minimum retail resale prices, effective September 16, 1959, as follows:

Esso Gasoline @ 19.9 cents per gallon.
Esso Extra @ 22.9 cents per gallon.

Golden Esso Extra @ 25.9 cents per gallon.

These facts are included in Petitioner's Complaint, paragraphs 14 to 18, inclusive.

Petitioner's Record 11a, 12a.

When some of the dealers supplied by the respondents refused to be coerced in this price-fixing scheme, each respondent filed a series of injunction suits against its own dealers in the Pennsylvania State Courts. A partial list of these injunction proceedings is noted in Petitioner's Record, pp. 20a, 21a, 22a.

A few of these cases reached the Supreme Court, the highest Court of Appeals in the Commonwealth of Pennsylvania, but only two were finally argued and decided by the Supreme Court of Pennsylvania. They are cited as follows:

Sinclair Refining Co. vs. Schwartz, 398 Pa. 60, decided December 30, 1959, and

Gulf Oil Corporation vs. Mays, 401 Pa. 413, decided October 10, 1960.

In both these cases the injunctions granted to the respondents as plaintiffs in the Common Pleas Courts were reversed by the Pennsylvania Supreme Court for one of the reasons, inter alia, that the respondents did not qualify for protection under the Pennsylvania Fair Trade Act, for the reason that the respondent oil companies were in competition with their own dealers in selling direct to the consumer public at prices charged less than they sell to their own dealer.

Though these activities of the respondents were declared illegal as early as December 30, 1959, under the

Pennsylvania Fair Trade Act, respondents did not cease these activities but continued to enforce these illegal injunctions until June of 1961, which, significantly, was *one month after the Petitioner filed this antitrust suit in the Federal Court.*

Petitioner's Rec. 35a, 36a.

The Petitioner was named defendant in one of these injunction suits brought by "Sinclair", his supplier, on January 22, 1959 in Common Pleas Court No. 5 of Philadelphia County in the Commonwealth of Pennsylvania as of December Term, 1958, No. 1988. A preliminary injunction was granted in the State Court below on February 9, 1959 and made final on March 28, 1960. Whereupon the Petitioner filed his appeal to the Pennsylvania Supreme Court on June 3, 1960 as of January Term, 1960, No. 296.

While this appeal was pending, the Supreme Court of Pennsylvania had decided.

Gulf vs. Mayo, supra.

As a result, "Sinclair", instead of pressing the appeal in that Court, entered into a stipulation with Petitioner, inter alia, to dissolve the injunction with a procendendo to the Common Pleas Court below.

The further hearing under this order by the Pennsylvania Supreme Court was listed for March 7, 1961, and "Sinclair" refused to proceed with the trial which "Sinclair" of its own accord had initiated, and instead asked the Common Pleas Court to dismiss the proceedings, which the Court below did.

Petitioner's Rec. 11a (Para. 13).

On the day before this hearing, namely on March 6, 1961, "Sinclair" served a formal notice upon the Petitioner terminating their contract as of June 1, 1961. There was no cause or reason whatsoever given by "Sinclair" to Petitioner for this arbitrary step on the part of "Sinclair".

Petitioner's Rec. 13a (Para. 24).

As a result of this capricious action on the part of "Sinclair", the Petitioner brought suit against "Sinclair" for Malicious Use of Civil Process in Common Pleas Court No. 7 of Philadelphia County in the Commonwealth of Pennsylvania, as of March Term, 1961, No. 1022, which suit is now pending awaiting trial in the State Court.

In addition to the foregoing, the Petitioner in his antitrust suit in the United States District Court made further allegations in support of his charge of conspiracy to violate the antitrust laws by the respondents as follows:

1. The equity proceeding against Petitioner was part of the conspiracy entered into by "Sinclair" with the other respondents to create a monopoly and control the retail resale price of gasoline between them in the Philadelphia area.

Petitioner's Rec. 10a (Para. 8).

2. "Sinclair" by refusing to proceed with the new hearing tacitly admitted that the injunction proceedings against Petitioner was capricious and not based upon any facts whatsoever.

Petitioner's Rec. 11a (Para. 13).

3. "Sinclair" did not, therefore, institute the equity proceedings against the Petitioner in good faith, but as a party to an agreement and conspiracy with the other re-

spondents to fix prices for the retail sale of gasoline for the purpose of creating a monopoly and thereby control the prices among themselves in the Philadelphia area, in violation of the laws of the United States and the Acts of Congress heretofore referred to in paragraph 5 of the Complaint.

Petitioner's Rec. 12a, 14a (Para. 20, 25a).

4. Loss of Petitioner's good will by "Sinclair" cancelling Petitioner's franchise, which took ten years to build up to a profitable business to almost one-half million gallons of gasoline annually.

Petitioner's Rec. 13a (Para. 24).

5. The determination of the contract by "Sinclair" with Petitioner was in apparent contradiction to "Sinclair's" own self-interest, and solely for the purpose of aiding and abetting in the general conspiracy entered into by it with all the other respondents, since "Sinclair" wilfully, deliberately and voluntarily surrendered a profitable sale of its gasoline product by Petitioner amounting to almost 500,000 gallons annually.

Petitioner's Rec. 14a (Para. 25(b)).

6. That "Sinclair" wilfully, deliberately and maliciously terminated the said contract as a retaliatory measure against Petitioner from asserting his full rights against "Sinclair" through the proper legal channels. That this was Sinclair's contribution to the aforesaid conspiracy to compel Petitioner to sell at the similar demanded minimum resale retail prices ordered by "Texaco", "Humble" and "Gulf", the other respondents, to their respective retail dealers.

Petitioner's Rec. 14a (Para. 25a).

In addition to the foregoing allegations in the Complaint, the Petitioner spread upon the record the conviction of "Texaco", one of the respondents, in a conspiracy to fix prices and fined $45,000 in the United States District Court for the Northern District of Indiana, No. 2199.

Petitioner's Rec. 18a, Note 20.

The Petitioner also introduced into this record an adjudication by the Pennsylvania State Court charging "Humble", another respondent, with conspiracy. This arose in one of the injunction suits brought by "Humble" as plaintiff against its dealer named Ciambriello and included in the list of suits filed by respondents. (Petitioner's Record 21a) designated *Esso vs. Ciambriello*, C. P. 1, Sept. Term, 1959, No. 3195. This case is not reported in any official reports.

Here, Chudoff, J., speaking for the Court, said:

> ". . . The circumstances of the case . . . justify the inference that plaintiff acted in concert and in common tacit agreement with the other major oil companies in the Philadelphia area in maintaining a uniform price level for the regular brands of gasoline . . ."

Petitioner's Appendix 33a.

and then made the following conclusions of law:

> "3. Plaintiff's fair trade program is in violation of the McGuire Amendment, Sec. 5(a) of the Federal Trade Commission Act, and, therefore, the Pennsylvania Fair Trade Act does not validly apply."
>
> "4. Plaintiff's agreements or contracts providing for the establishment or maintenance of minimum

resale prices in its motor fuel contracts within the Commonwealth of Pennsylvania are invalid, unlawful and unenforceable by reason of plaintiff and defendants being 'persons' in competition with each other in violation of the Miller-Tydings Amendment of the Sherman Act and the McGuire Amendment of the Federal Trade Commission Act (supra)." (Petitioner's Appendix 34a)

There was further evidence introduced into this record that the respondents were in open competition with their own dealers in selling gasoline direct to the consumer public and at prices less than they charged their own dealers.

These charges were directed against "Sinclair" and "Humble", respondents, who together with "Gulf" admitted that they reserved this right by agreement with their dealers.

Petitioner's Rec. 35a (also 31a).

To all these factual allegations charging a conspiracy by all the respondents to fix prices in violation of the Antitrust Laws, the respondents filed a joint Motion for Summary Judgment under Federal Rule 56(b) appended hereto, which the United States District Court denied, but granted in part against paragraphs 22 and 23 of the Complaint by dismissing these two paragraphs from the Complaint.

Petitioner's Rec. 16a.

To this Order of the United States District Court granting in part the Motion for Summary Judgment the Petitioner filed his Exceptions,

(Document 68 of Record.)

although exceptions are not necessary under Federal Rule of Procedure 46 hereto appended.

Each respondent then filed its Answer to the Complaint denying these charges of conspiracy and simultaneously each filed affidavits and supplemental affidavits supplementing in the main these denials.

Petitioner's Rec. 23a to 30a, 35a, 36a.

After filing their Answers and Affidavits, respondents again renewed their Motion for Summary Judgment, and Judge Van Dusen of the United States District Court for the Eastern District of Pennsylvania *reversed himself* and granted judgment on this Motion under Rule 56(b) in a Memorandum Opinion reported in 204 Fed. Suppl. 553.

Petitioner's Rec. 37a et seq.

To this Opinion Van Dusen, J. entered the following Order:

"Order and Judgment

(Document No. 66)

And Now, May 4, 1962, after consideration of the foregoing Motion, the brief of counsel (Documents Nos. 50, 56 and 65), the letter of March 22, 1962, which has been attached to Document No. 50, oral argument, and the record, It Is Ordered that defendants' Renewed Motion for Summary Judgment (Document No. 41) is Granted, and Judgment is entered in favor of Texaco, Inc., Humble Oil & Refining Company, Gulf Oil Corporation, and Sinclair Refining Company, defendants, and against Pasquale Fiumara, plaintiff.

(s) Francis L. Van Dusen, *J.*

There is no need to rule on defendants' Motion To Amend the Order of January 16, 1962 (Document No. 41), which is moot in view of the above Order for the entry of judgment in favor of defendants."

Petitioner's Rec. 42a.

Upon appeal the United States Court of Appeals for the Third Circuit affirmed the foregoing order of May 4, 1962, by the District Court, granting Respondents' Motion for Summary Judgment against Petitioner.

And it is from this Judgment by the United States Court of Appeals for the Third Circuit that the Petitioner files this Petition to this Court requesting a Certiorari to the aforesaid United States Court of Appeals for the Third Circuit.

(f) DECISION OF STATE COURT TO BE REVIEWED

This does not concern a review of any decision by a State Court.

(g) BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

This is based upon the Clayton Antitrust Act approved October 15, 1914, Section 4; 38 Stat. L. 731; 15 U.S.C. Sec. 15.

Section 4 of the Clayton Act provides:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

(h) REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The affirmance of the Order of the United States District Court by the Court of Appeals for the Third Circuit is in direct conflict with the decision of the United States Court of Appeals for the First Circuit in a similar matter.

Esso Standard Oil Co. vs. Secatore's Inc., 246 Fed. 2nd 17.

Here "Esso", one of the respondents in the within case, tried to restrain the defendant, its retailer, from selling below the minimum retail prices established by Esso under the Fair Trade Agreement.

The Massachusetts United States District Court denied the injunction and the *United States Court of Appeals for the First Circuit* affirmed the court below on the ground that "Esso" sold gasoline to ultimate consumers, such as fleet operators, etc. in direct competition with its own dealers. This constituted a violation of the Federal Antitrust Laws.

The result of the decision by the United States Court of Appeals for the Third Circuit affirming the United States District Court in our case is in direct conflict with the foregoing since in our case the Third Circuit condones competition between the respondents and their own retailers.

2. The decision in the case at bar is in direct conflict with the decisions in similar matters by the highest appellate court, the Supreme Court of Pennsylvania.

Gillette Company, Appl. vs. Master, 408 Pa. 202, decided June 28, 1962.

Here the plaintiff brought injunction proceedings under the Pennsylvania Fair Trade Act of 1935, June 5, P. L. 266, as amended; 73 P.S. Sec. 7-11, to compel defendant to sell the pharmaceutical products manufactured by plaintiff at the established minimum retail prices by the plaintiff.

Common Pleas Court No. 3 of Philadelphia denied the injunction and affirmed on appeal.

The sole issue in the court below was whether plaintiff, as a foreign corporation, could legally do business in Pennsylvania without registration. On appeal, however, one of the questions raised was the following:

> "Where a defendant in an action brought under Section 2 of the Act of 1935 has demanded proof that plaintiff's products are sold in fair and open competition within the Commonwealth, can the parties, by means of a stipulation, subsequently remove this issue from the consideration of the trial court at a hearing on a rule to show cause why a preliminary injunction should not issue?"

The Pennsylvania Supreme Court, said through Cohen, J. (p. 212):

> "Before a court can entertain an action for a preliminary injunction under section 2 of the Act of 1935 (73 PS Sec. 8), it must be established that

the plaintiff-producer's products are in fair and open competition within the state. Parties cannot by agreement eliminate this requirement and confer power upon the court to enter an injunction despite lack of compliance with the statutory provision. * * * "

Thus it is against the public policy of the Commonwealth of Pennsylvania to permit suppliers to be in direct competition with their own dealers, while the affirmance of the District Court in this case by the court below goes directly counter. This affirmance by the United States District Court of Appeals for the Third Circuit, if permitted to stand, would sustain agreements between suppliers and dealers permitting competition between them in the Commonwealth of Pennsylvania.

General Electric Co. vs. Hess Bros., 155 Fed. Suppl. 57, decided August 19, 1957.

Here, Hess Brothers, a department store in Allentown, Pennsylvania, sold appliances manufactured by the General Electric Company below the minimum retail Fair Trade prices set by the plaintiff and an injunction was instituted to restrain defendant from selling below plaintiff's scheduled prices in the United States District Court for the Eastern District of Pennsylvania.

Defense claimed that the Pennsylvania Fair Trade Act did not apply because plaintiff was in direct competition with defendant.

Plaintiff countered with the claim that its Fair Trade Agreements contained the exception in its favor, similar to those in Respondents' Fair Trade Agreements with its own dealers, as follows:

> "The indicated retail prices do not apply to sales made to employees of the General Electric Company or to sales by distributors or dealers of these products to their own employees or to sales to governmental agencies or to commercial or institutional establishments buying for their own use and not for resale."

With reference to this exemption clause, in the course of his opinion, Judge Van Dusen, the trial judge in that Court, said in the *Hess* case (p. 65):

> "Although counsel and the hearing judge have not been able to find any Pennsylvania appellate court decision discussing this principle, the hearing judge finds that it is consistent with Pennsylvania law as it existed on May 1, 1956, and would be applied by the Pennsylvania appellate courts in an appropriate case * * * "

and then goes on to find the following Conclusion of Law (p. 68):

> "7. The exemption clause contained in plaintiff's fair trade minimum retail price schedule does not render plaintiff's minimum fair trade prices illegal or unenforceable."

Since 1957 the Supreme Court of Pennsylvania has spoken concerning the Pennsylvania Fair Trade Act, first on *December 30, 1959* in *Sinclair Refining Co. v. Schwartz*, supra, and subsequently in *Gulf vs. Mays* (supra) and *Gillette vs. Master* (supra).

3. The decision by the Court of Appeals for the Third Circuit is also in conflict with the decisions of this Court in dealing with motions for summary judgments under Federal Rules of Civil Procedure 56.

Poller vs. Columbia Broadcasting Co., 368 U.S. 464, decided February 19, 1962.

This was also a case involving the antitrust laws. It holds that all doubt under a motion for summary judgment must be resolved in favor of the opposing party litigant, where Justice Clark, speaking for this Court, said (p. 473):

> ". . . We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"

In the case at bar Judge Van Dusen by deciding in the District Court first in favor of the Petitioner and then, upon the same state of facts reversing himself, shows that he, himself, was hesitant and in doubt, and should therefore have decided in favor of the Petitioner. To permit the affirmance of Judge Van Dusen's order to stand would, therefore, be in direct conflict with the rulings of this Court in

Poller vs. Columbia Broadcasting Co. (supra).

4. The affirmance of Judge Van Dusen's order by the court below is contra to this Court's rulings on another ground, as is evidenced by the refusal of a certiorari by this court in

> *Esso Standard Oil vs. Secatore's, Inc.*, 355 U.S. 834.

In the refusal to allow a certiorari to the United States Court of Appeals for the First Circuit in the case of *Esso Standard Oil vs. Secatore's, Inc.* (supra), this Court sustained the principle that suppliers are violating the antitrust laws when they are in direct competition with their own dealers, whereas the sustaining of Judge Van Dusen's order by the court below goes directly contra to this Court's decision, in that it gives validity to the action of a supplier to compete with its own dealer.

5. The decision by the court below is in direct conflict with the decisions of the Pennsylvania Supreme Court, the highest court of appeals, also on another ground.

It will be noted that all the respondents engaged in a "conscious parallelism" in fixing their retail resale prices for their gasoline products which they imposed upon their dealers.

This fact creates a presumption that the respondents were parties to an agreement or conspiracy to fix prices,

> *Gulf Oil Corp. vs. Mays* (supra),

where Justice Cohen of that Court said (p. 420):

> "* * * If there is so-called 'conscious parallelism' in fixing gasoline prices, it is certainly probative evidence that in fact gasoline is not sold in free and open competition. Since these conditions and cir-

cumstances prevail at least to some extent in the distribution of gasoline products, it is incumbent upon the appellee here to prove to the satisfaction of the Court * * * that it is not a party to any agreement or conspiracy to fix prices."

The affirmance by the court below of the decision by the court of first instance in our case is a denial of the presumption that the burden rests upon the respondents to rebut the charge of agreement or conspiracy when they engage in "conscious parallelism" in fixing gasoline prices, as they did in this case, directly contrary to the law of Pennsylvania in which state these activities occurred.

(i) THERE ARE NINE COPIES OF THE PRINTED PARTS OF THE RECORD FILED BY BOTH PETITIONER AND RESPONDENT WITH THIS COURT

There are appended both the judgment and opinion of the United States Court of Appeals for the Third Circuit entered by the court below on December 20, 1962, and also the order and judgment entered by the United States District Court for the Eastern District of Pennsylvania, the court of first instance, on May 4, 1962.

These are set forth in this Petition for a Certiorari on pages 3 and 2.

THE FEDERAL QUESTION INVOLVED IS OF NATIONAL IMPORTANCE.

Since the retail sale of gasoline by the neighborhood service stations occupy a very large segment in our national economy, their rights, therefore, should be stabilized.

CONCLUSION

The Petitioner has shown decisively that the affirmance by the United States Court of Appeals for the Third Circuit of the judgment entered by the United States District Court for the Eastern District of Pennsylvania in this case is in conflict with decisions on the same matter by the United States Court of Appeals for the First District, the Supreme Court of Pennsylvania, the highest appellate court in the Commonwealth of Pennsylvania, and with the decisions of this Court.

For these reasons we respectfully submit that this Petition for a Writ of Certiorari should be granted to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

A. E. Hershman,
Attorney for Pasquale Finnegan, Petitioner.

APPENDIX

Sherman Antitrust Act.

Approved July 2, 1890, secs. 1, 2, 4 and 7, 26 Stat. L. 209-10, 15 U.S.C.A. secs. 1, 2 and 5:

An Act to protect trade and commerce against unlawful restraints and monopolies

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding

one year, or by both said punishments, in the discretion of the court.

* * * * * * * * * *

Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

* * * * * * * * * *

Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Clayton Antitrust Act,

Approved October 15, 1914, secs. 1, 3 and 4, 38 Stat. L. 730 1, 15 U.S.C.A. secs. 12, 14 and 15:

An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That "antitrust laws", as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes'", approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce", as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under

the jurisdiction of the United States: *Provided*, That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

* * * * * * * * * * *

SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodity of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

SEC. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to

the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Miller-Tydings Act.

Approved August 17, 1937, Title VIII, 50 Stat. L. 693, 15 U.S.C.A. 1, 2:

An Act to provide additional revenue for the District of Columbia, and for other purposes.

Title VIII—Amendment to the Antitrust Laws

Section 1 of the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890, is amended to read as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is

to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition, under section 5, as amended and supplemented, of the act 'entitled 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes', approved September 26, 1914: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Approved, August 17, 1937.

McGuire Act.

Approved July 14, 1952, Secs. 2 and 5,
66 Stat. L. 631-2, 15 U.S.C.A. 45:

An Act to amend the Federal Trade Commission Act with respect to certain contracts and agreements which establish minimum or stipulated resale prices and which are extended by State law to persons who are not parties to

such contracts and agreements, and for certain other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the purpose of this Act to protect the rights of States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce.

SEC. 2. Section 5 (a) of the Federal Trade Commission Act, as amended, is hereby amended to read as follows:

"SEC. 5. (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when

contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

* * * * * * * * *

"(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

28 U. S. Code of Judicial Procedure, Section 1254:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

1. By writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. * * *"

28 U. S. Code of Judicial Procedure, Section 1652:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

28 U. S. Code of Judicial Procedure, Section 1291:

"The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States * * *."

Federal Rule of Civil Procedure 46:

"Formal exceptions to rulings or orders of court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him."

Federal Rule of Civil Procedure 56 (b) provides:

* * * * * * * * *

"For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

The Pennsylvania Fair Trade Act

Approved June 5, 1935, P.L. 266, Sec. 1, 73 P. S. Sec. 7

"Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, or the vending equipment from which said commodity is sold to the consumer bears the trade-mark, brand or the name of the producer or owner of such com-

modity, and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed in violation of any law of the State of Pennsylvania by reason of any of the following provisions which may be contained in such contract:"

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No. 841.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

PASQUALE FIUMARA,

Petitioner,

vs.

TEXACO INC., HUMBLE OIL & REFINING COMPANY, GULF OIL CORPORATION and SINCLAIR REFINING COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION.

This is a case in which a plaintiff makes a charge in a complaint but has no evidence to support it even after the full arsenal of federal discovery procedures has been made available to him.

There has never been any genuine issue as to a material fact in this case. Petitioner, in the absence of any evidence from which a trier of fact might infer illegality, rested on the bare conclusory allegations of his complaint.

This was plainly insufficient to defeat respondents' motion for summary judgment, since "the very mission of [that] procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial."[1]

The questions presented by the petition, and the reasons advanced for granting the writ, are fanciful. There is no conflict between the decision below and any decision of this Court or another Court of Appeals. Nor was anything decided below of importance to anyone except the particular litigants.

What the present case involves is a naked claim of a horizontal conspiracy to fix prices in violation of the antitrust laws. The claim was based solely on the fact that each of the four respondent oil companies, acting at different times over a period of almost a year pursuant to applicable fair trade legislation, established a similar minimum resale price for gasoline of comparable quality in the Philadelphia area (R. 11a-12a).[2] At his deposition, petitioner conceded that he had no other evidence, documentary or oral, to support his claim of conspiracy (R. 10b-15b). When respondents thereafter moved for summary judgment, petitioner took the position that he was entitled to rely on the allegations of his complaint and that these, without more, necessitated a trial. Before granting the motion, the District Court gave petitioner every conceivable opportunity to present some evidence of conspiracy (R. 19b-20b), but none

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[1] Judicial Conference of the United States, Report of Proposed Amendments to Certain Rules of Civil Procedure for the United States District Courts (September, 1962), 31 F. R. D. 35, 62 (1963).

[2] Record references are to the appendices to the briefs in the court below. Where the number is followed by an "a", the reference is to a page of the appendix of plaintiff-appellant below (petitioner herein). Where the number is followed by a "b", the reference is to a page of the appendix of defendants-appellees below (respondents herein).

was forthcoming. Judgment, accordingly, was entered for respondents on the ground that there was no genuine issue as to any material fact and respondents were entitled to judgment as a matter of law. Thereafter, the Court of Appeals affirmed without opinion.

It is noteworthy that this very same Court of Appeals was referred to by the Judicial Conference because of certain early decisions[3] in which it permitted "the pleadings themselves to stand in the way of granting an otherwise justified summary judgment"—a doctrine that was declared to be "incompatible with the basic purpose of the rule" (31 F. R. D. at 62). Indeed, these decisions—although the Third Circuit itself subsequently departed from them—have just spawned an amendment to Rule 56 to make clear that when "a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." It was hoped that this amendment would "contribute to the more effective utilization of the salutary device of summary judgment" (31 F. R. D. at 62). The fact that the Third Circuit, which has been so notoriously reluctant to sustain a motion for summary judgment, did so in this case is eloquent testimony of the sham nature of petitioner's claim.

The record in this case does not bear the slightest resemblance to that in *Poller* v. *Columbia Broadcasting Co.*, 368 U. S. 464 (1962), where the plaintiff came forward with sufficient proof to create a triable issue of fact. Here, petitioner came forward with nothing.

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[3] *E.g.*, *Frederick Hart & Co., Inc.* v. *Recordgraph Corp.*, 169 F. 2d 580 (3d Cir. 1948); *United States ex rel. Kolton* v. *Halpern*, 260 F. 2d 590 (3d Cir. 1958).

Since the issue below was whether there was any proof of a horizontal price fixing conspiracy among respondents, not whether the fair trade program of each respondent was enforceable against its respective dealers, such cases as *Esso Standard Oil Co.* v. *Secatore's, Inc.*, 246 F. 2d 17 (1st Cir. 1957), *cert. denied*, 355 U. S. 834 (1957), *Gillette Company* v. *Master*, 408 Pa. 202, 182 A. 2d 734 (1962), *Gulf Oil Corp.* v. *Mays*, 401 Pa. 413, 164 A. 2d 656 (1960), and *Sinclair Refining Co.* v. *Schwartz*, 398 Pa. 60, 157 A. 2d 63 (1959), cited by petitioner, are entirely beside the point.

The petition presents no question worthy of review by this Court. There is no conflict to be ironed out and no important principle to be considered. The petition, accordingly, should be denied.

Respectfully submitted,

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